WONG YING & ORS.

v.

CHIN WAH OMNIBUS CO. LTD.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 71 OF 1980]
19 OCTOBER 1983

LABOUR LAW: *Employment - Whether taxi drivers were employees within the meaning of the Employment Act - Claim for wages in lieu of annual leave, public holidays and rest days - Indicia of contracts of service.*

The appellants were drivers of taxis owned by the respondent company. They claimed for wages in lieu of annual leave, public holidays and weekly rest days. The Labour Officer held that they were employees and entitled to wages in lieu of annual leave but that they were not employees of the company for wages in lieu of weekly rest days and public holidays. The drivers appealed.

Held:

[1] (a) Since the company had the power to select and dismiss any of the drivers and the regular payment of a fixed salary with payment of EPF contributions based thereon despite the sharing of takings was consistent with a contract of service rather than a contract for services.

(b) On the matter of control i.e. *indicium* the fact that the drivers were liable at any time to be called up by the trip master of the company to carry oil companies' workers and mechanics and fitters was sufficient evidence of control to satisfy indicium.

(c) The drivers were employed as part of the business of the company and their work was done as a integral part of and not an accessory to the business of the company.

(d) On the question of dismissal the fact that if the vehicles were not properly maintained the company could give the vehicles to others to run; its doing so must necessarily involve the dismissal of the unsatisfactory drivers. The company would then have a choice from the other drivers.

[2] The combined effect of the factors lead to the conclusion that it was more probable that the drivers were employees.

[3] As employees within the purview of the Employment Act the drivers were entitled to their wages in lieu of annual leave and public holidays.

[Appeal allowed.]

Cases referred to:

Employees Provident Fund Board v. M.S. Ally & Co. Ltd. [1975] 2 MLJ 89
Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans [1952] TLR 101

For the appellants - Lee Cheng Eng; M/s. Chan & Chia
For the respondent - S.K. Lingam; M/s. S.K. Lingam & Co.

JUDGMENT

Peh Swee Chin J:

The appellants (the drivers), drivers of taxis owned by the respondent (the company), claimed before the Labour Officer, Seremban, under the Employment Act 1955 (the Act) to be employees of the company, and for wages in lieu of annual leave, public holidays and weekly rest days. The Labour Officer held they were employees and entitled to wages in lieu of annual leave, and, at the same time, they were not employees of the company for the purpose of wages in lieu of weekly rest days and public holidays. The drivers appealed against the decision but the company had not cross-appealed against that part of the decision that the drivers were employees and entitled to the wages in respect of annual leave. I allowed the appeal and now give my grounds.

There could be no doubt that from the evidence adduced and submissions made by Counsel, there were two questions before the Labour Officer. The first was whether the drivers were the employees or servants of the company; and the second was, that if the answer to the first question was in the affirmative, then as to how much of the wages in lieu of annual leave, weekly rest days and public holidays was due to each of the drivers.

Most surprisingly, the answer of the Labour Officer, from his decision, to the first question as to whether the drivers were the employees or servants, was a "yes" and a "no" at the same time, "yes" because or when they carried the oil companies workers and the company's mechanics and fitters on the instruction of the company with no passage money payable to the drivers, and "no" when the drivers carried passengers. (other than those just mentioned). who paid the passage money which was, in fact, shared in certain way between the company and the drivers. Such a decision in my judgment was a nullity. It could be loosely described as a split decision, or similar in a way to a majority verdict of a 7-man jury in a murder trial, where the seven jurors are seven Judges of facts, except that in a trial by jury, we have one verdict but here, there appear to be two verdicts.

The decision of the Labour Officer was a serious error which would not have been excusable, had he been a legally trained man. Day in and day out, the Courts have to reach a conclusion in the face of two conflicting and contradictory evidence and submissions thereon as were presented to the Labour Officer. The proper and usual way for the Labour Officer to deal with them, would have been to consider, on a balance of probabilities, the combined effect of all the relevant factors which pointed, of course, to two opposing directions and to decide which version was more probable. If it was more probable that the drivers were employees, then he would have so decided, bearing in mind the fact that none of the factors before him was. by itself, conclusive or decisive of the outcome of the question before him. Having regard to all the circumstances in this case, it would not be necessary to order a retrial and this Court could evaluate the wealth of details available from the printed record and most of them were not in dispute. In evaluating the evidence, the factors that the Court took into consideration were the same as those four *indicia* of contracts of service approved by Wan Suleiman FJ in delivering the judgment of the Federal Court in *Employees Provident Fund Board v. M.S. Ally & Co. Ltd.* [1975] 2 MLJ 89, viz. (a) the master's power of selection of his servant, (b) the payment of wages or other remuneration, (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal. On *indicium* (c) relating to control, his Lordship there sounded a caution that this traditionally most important factor or decisive factor was based on simpler socioeconomic conditions of a by-gone age and must be modified; and the modification his Lordship adopted was Lord Denning's dictum in *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans* [1952] TLR 101, 111 in these words:

> ... One feature which seems to run through the instances is that, under a contract of service, a man in employed as a part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

The following facts were not and appeared to be not in dispute. The company was the owner, of buses as well as a fleet of taxis of which the drivers were the drivers. For 5 or 6 days in each month, not being fixed days in any part of each month, the drivers were required to carry and convey workers of two oil companies. All passage money for these passengers was paid by the oil companies to the company. Occasionally the drivers were required to carry the company's mechanics or fitters to such places as were required and for this, no passage money was payable. The drivers on other days of the month, operated the taxis and collected the passage money from passengers other than those just mentioned. Out of such collections, each of the drivers would have to pay over to the company RM22 per day. On festival days, an increased sum of RM25 was payable. If any of the drivers collected less than RM22 per day, he would only be liable to pay the sum actually collected by him. While carrying those passengers other than those specified above, he would be liable to pay for the diesel oil, but all repairs of the taxis would be carried out by the company at the latter's expense. The drivers were paid also regularly a fixed salary each month varying between RM90 to RM115. Employees provident fund contributions were paid, based on such fixed wages. When the drivers were required to carry the company's mechanics or fitters to places as required, food allowance of RM1 for carrying mechanics or fitters and RM2 for carrying oil workers would be paid to each of the drivers. They also were provided with free medical treatment. All the drivers were driving the taxis of the company, at least since 6.2.73, the commencement date for calculating the claims of the drivers,(as agreed by both Counsel, subject to proof of liability for the claims) until the end of 1978. The drivers were never paid the sums as claimed, viz. wages in lieu of annual leave, public holidays and weekly rest days. The drivers were allowed to keep the taxis at home. There was an official of the company called the trip master at the bus stand of the company and the drivers were contacted through this trip master at the said bus stand. The drivers had to pay the fixed rate of RM22 per day (or RM25 per day as the case may be) once in about every four days. Each of the drivers earned about RM100 to RM200 per month apart from the fixed salary paid by the company. All these apparently undisputed facts would have to be borne in mind in conjunction with other evidence.

On the matter of selection i.e *indicium* (a), none of the drivers said as to how he was first employed by the company, except that they had all worked continuously for at least five years. The only inkling about that came from the evidence of DW2, the managing director of the company. He said, at page 36 of the record:-

> ... We could not dismiss these drivers as they were not employed by us. If the vehicles were not properly maintained, then we will decide to give the vehicles to others to run ...

This piece of evidence was highly equivocal because if DW2 could give the vehicles to others to run, then his doing so must necessarily involve the dismissal of the unsatisfactory drivers in question. DW2 would then have a choice from other drivers. Taking account of fairly attractive terms enjoyed by the drivers, viz. a fixed salary plus sharing of the income or takings, and all other circumstances, I was of the view that it could be inferred that the company had power to select and dismiss any of the drivers. On the matter of payment of wages, i.e. *indicium* (b), the regular payment of a fixed salary with payment of EPF contributions based thereon, despite the sharing of the takings by way of deduction of RM22 or RM25 per day as the case might be, was highly consistent with a contract of service rather than a contract for services.

On the matter of control i.e. *indicium* (c), when the drivers were not carrying oil companies' workers and mechanics or fitters of the company, the drivers appeared to be driving the taxis for the mutual benefit of the company and themselves for about 26 days. The company was earning income in the form of RM22 per day per taxi; the drivers were entitled to keep any sum over and above RM22 from the daily takings. The drivers were liable at any time, to be called up by the trip master at the company's bus stand to carry oil companies' workers and carry mechanics and fitters. I felt there was sufficient evidence of control to satisfy *indicium* (c). By applying the organisation test adopted by the Federal Court in the *Employees Provident Fund Board case (supra)*, I had no doubt there was sufficiency of control for the purpose of *indicium* (c); because the drivers were "part and parcel" of the company, the drivers were employed as part of the business of the company and their work done as an integral part of and not an accessory to the business of the company.

On the matter of dismissal, i.e. *indicium* (c), what I said earlier in connection with selection adequately would cover this also.

The combined effect of the factors set out above, led me to conclude that it was certainly more probable than not that the drivers were employees. Further as employees within the purview of the Employment Act 1955, the drivers were ordinarily entitled to their claims for wages in lieu of annual leave etc. under the Act unless the evidence pointed the other way.

Public holidays, weekly holidays and annual leave, on the evidence, more probably than not, had not been taken by the drivers. The drivers were naturally desirous of maximizing the daily takings when the drivers were carrying those passengers, in respect of whom they had to share such takings with the company. There was also provision for increased payment of RM25.00 per day to the company on festival days when the business of the taxis would be more lucrative. In fact DW1, the clerk of the company said, *inter alia*, that the drivers actually worked on Sundays (Page 32, 6th line), and that "the actual number of days worked was 31 days", (Page 32, 13th line). The drivers were therefore entitled to all such wages in lieu thereof. Counsel had suggested and both Counsel had agreed before me that they would determine the amounts of such wages for drivers by themselves and the Labour Officer, and in default of such agreement, the amounts would be argued further. I therefore allowed the appeal, setting aside the whole of the decision of the Labour Officer; giving judgment for the drivers, on their claim to be employees directing the amounts of such wages in lieu aforesaid to be so determined by agreement of the parties herein and in default of such agreement, the question of such amounts to be argued and the costs of such further argument would be provided for later.

Also found at [1984] 1 CLJ 199